Supreme Court, U.S.
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No. 87-436

IN THE
# Supreme Court of the United States
October Term, 1987

VINCENT C. LOMBARDI, *et al.*,
*Petitioners,*

v.

DOW CHEMICAL CO., *et al.*,
*Respondents.*

*In re "Agent Orange" Product Liability Litigation*

## PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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## PETITIONERS' REPLY MEMORANDUM

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### I. THE EXISTENCE OF CONTROVERTED FACTS IN THIS IMPORTANT CASE SUPPORTS A GRANT OF CERTIORARI.

The respondent chemical companies, in their opposing brief, take the position that there is no need for this Court to address the military contractor defense in the context of the Agent Orange Litigation because the Second Circuit ruled that the petitioners' claims are barred under any formulation of the defense. (Resp. Brief in Opposition at 9). According to respondents, the petitioners' claims can never survive the defense because all formulations of the defense assume the

existence of a dangerous defect of which a military contractor has a duty to warn, and petitioners have failed to prove such a defect existed with regard to Agent Orange. (Resp. Brief in Oppositon at 13). Respondents support this assertion by citing to factual evidence which they allege shows that there were no known hazards associated with the use of Agent Orange either during the Vietnam War or today. (*See* Resp. Brief in Opposition at 304, 6-9).

Respondents' assertion, however, fails in two respects. First, respondents rely upon facts which are misplaced and controverted. Second, by focusing on these facts, respondents have obscured the legal issues which compel granting certiorari in this case.

Respondents attempt to distill their argument down to the simple statement that petitioners are unable to prove a causal link between Agent Orange or dioxin and their injuries. However, respondents' presentation of the facts is oversimplified and, indeed, fails to mention recent studies which demonstrate that these facts are, at the very least, controverted. Their reliance on the Ranch Hand study is but one example of how the respondents have misconstrued the facts surrounding this case.

Respondents cite to the court below for the proposition that, according to the Ranch Hand study, there is no question of fact that Agent Orange cannot be shown to have caused any of the veteran petitioners' injuries. (Resp. Brief in Opposition at 4). However, both respondents and the court below overlook an important fact: while the Ranch Hand study may not have absolutely established causation, it did find an association between exposure to Agent Orange and lymphoma. *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1223, 1234 (E.D.N.Y 1985). (App. p. 507a). Moreover, a re-

cent study conducted by the National Cancer Institute noted that while the Ranch Hand study reported no deaths due to lymphoma as of December, 1982, less than one such death would have been expected in a sample that small in size. Hoar, *et al., Agricultural Herbicide Use & Risk of Lymphoma & Soft-Tissue Sarcoma,* J.A.M.A. at 1145, September 5, 1986. The study, therefore, can hardly be said to authoritatively prove a lack of causation between lymphoma and Agent Orange. Importantly, John Lilley, whose case was dismissed below, was an Operation Ranch Hand veteran not included in the study who died of lymphoma. His death certainly raises genuine questions of fact about causation.

In addition to the National Cancer Institute Study mentioned above, the Veterans Administration recently released a study which found that Marine Corps Vietnam veterans had an increased mortality from non-Hodgkins lymphoma and lung cancer when compared to Marines who did not serve in Vietnam. Breslin, *et al., Proportionate Mortality Study of Army & Marine Corps Veterans of the Vietnam War,* Veterans Administration Office of Environmental Epidemiology, September 3, 1987. Non-Hodgkins lymphoma has been associated with exposure to phenoxy herbicides. *Id.* at 13. Lung cancer has also been associated with exposure to phenoxy herbicides. *Id.* at 13-14. Although the Veterans Administration study is limited in that it did not investigate possible etiologic factors for these elevated malignancies, and the authors pointed out that additional work needs to be done in this area, *Id.* at 14, this recent study clearly points out that the causation issue is not as firmly resolved as respondents would have this Court believe.[1]

[1]According to a September 28, 1987 Washington Post Article, ten members of Congress accused the Veterans' Administration of concealing the study which showed a possible link between Agent Orange and malignancies. Washington Post, September 27, 1987, at A11, Col. 2. Reps. James J. Horio and Lane A. Evans asked for hearings into the matter. *Id.*

Finally, in response to the chemical companies' assertion that no material fact exists about causation, petitioners submit that not only do material facts exist today as a result of the above-mentioned recent studies, but also such facts existed at the time of the Second Circuit's opinion.

For example, Dr. Ellen Silbergeld, whom the district court conceded was an eminent scientist, provided an opinion that epidemiological studies of factory and farm workers exposed to dioxin, when taken together and evaluated for such considerations as dose and length of exposure, sensitivity of measurement and size of the study, support the conclusion that exposure to Agent Orange causes chloracne, cancer and liver disorders. (Brief of Appellants, No. 85-6163 at 25-26). In response to the district court's decision that only epidemiological studies of Vietnam veterans were relevant to the issue of causation, Dr. Silbergeld stated that the court had created an artificial distinction because a proper causation analysis could only be based upon a comprehensive survey of epidemiological literature which includes studies of industrial workers. *Id.* at 25. Another of petitioners' qualified experts, Dr. Samuel Epstein, reviewed over 30 epidemiological and over 50 animal studies as well as the medical records of Vietnam veterans and concluded that causation existed for a number of disease processes (*Id.* at 34-36).

Petitioners also introduced facts regarding causation at the District Court in the John Lilley case by way of an affidavit signed by petitioners' expert, Dr. Bertram Carnow. (App. to this Memorandum at 1a). In his affidavit, Dr. Carnow reviewed Mr. Lilley's medical and exposure history and also cited to epidemiological studies on dioxin exposure.[2] Such

[2]While the district court ultimately found both Dr. Carnow's and Dr. Epstein's affidavits supporting their testimony to be inadmissible, 611 F. Supp. at 1283, 1256 (App. pp. 616a, 557a), their testimony clearly pointed out controverted facts about Agent Orange exposure.

facts were also sufficient to lead Dr. Carnow to conclude that Mr. Lilley's exposure to Agent Orange was the likely cause of his death. (App. to this Memorandum at 10a).

Petitioners are aware that this Court typically does not grant certiorari in order to resolve factual disputes arising from the lower courts. However, the facts surrounding the Agent Orange controversy have been raised by the respondents at the expense of the pressing legal principles involved in this extraordinary case. Respondents have recited numerous facts in their opposing brief which, if left unaddressed, give the impression that the non-hazardous nature of Agent Orange is an open and shut case. Petitioners, therefore, are compelled to correct the respondents' misstatements. With much respect, petitioners maintain that the lower courts faced the nearly insurmountable task of forging their way through volumes of disparate data and, in their attempt to promote judicial efficiency, lost sight of the controverted nature of the facts. The courts below erroneously granted summary judgment and petitioners request that this Court grant certiorari in order to correct this error in such an important case.

Based on the above, respondents cannot avoid the compelling reasons which are presented for granting certiorari in this case by arguing that petitioners cannot prevail under any formulation of the military contractor defense. It is impossible to predict what formulation or combination of formulations of the defense, if any, this Court will adopt. This case cannot be decided before this Court sets forth its ruling on the military contractor defense. Accordingly, petitioners invite this Court to grant certiorari to review the Second Circuit's ruling on the defense.

## II. THE CIRCUIT COURT'S CONFUSION REGARDING THE STANDARD FOR THE BURDEN OF PRODUCTION IN SUMMARY JUDGMENT WARRANTS GRANTING CERTIORARI.

Respondents maintain that petitioners are improperly requiring the Second Circuit to cite to all the evidence on record in their opinion affirming summary judgment. (Resp. Brief in Opposition at 16). Respondents, however, are misconstruing petitioners' argument. Petitioners are not saying that the circuit court must cite to all the evidence in the record. What petitioners are saying is that the court must demonstrate that the moving party has met its burden of production, as set forth in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and the court has failed to adequately fulfill this requirement.

The facts surrounding the issue of whether the government knew as much as or more than the chemical companies about the hazards of Agent Orange has been vigorously contested throughout the course of this litigation. For example, the government filed under seal an opposition to the chemical companies' motion for summary judgment which raised genuine issues of material fact with regard to the level of knowledge the government possessed about the hazards of Agent Orange. The government in particular included portions of confidential memoranda which demonstrated that the chemical companies had actually suppressed information about the hazards of Agent Orange. (App. to this Memorandum at 16a). The courts below, however, never addressed this issue or the government's opposition. Accordingly, the courts below failed to demonstrate that the chemical companies met their burden of production with regard to overcoming the controverted facts which were presented by the parties.

It is clear from the Agent Orange example that there is much confusion about this court's ruling in *Catrett*. If the Second

Circuit's decision is allowed to stand, the standard for the moving party's burden of production in a summary judgment setting will be clouded and will create further conflict among the circuit courts.

Respondents further argued that the Second Circuit properly affirmed summary judgment under the *Catrett* ruling because the court made certain factual findings about the alleged hazards of Agent Orange. (Resp. Brief in Opposition at 15). Under the respondents' argument, however, a judge can take on the role of juror and resolve factual disputes, thereby essentially preventing the parties from effectively appealing a summary judgment decision. Such a scenario gives a judge extraordinary power — power which generally rests in the province of the jury. But, more importantly, the inevitable result is that the Courts of Appeals and the Supreme Court will be forever foreclosed from further review of trial court decisions. Accordingly, petitioners request that this Court grant certiotari in order to clarify the standard for summary judgment.

## CONCLUSION

For the reasons set forth in the petition and this reply, it is respectfully urged that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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# APPENDIX

## AFFIDAVIT

My name is Bertram Warren Carnow. I am a physician trained in Internal Medicine, Occupational and Environmental Medicine, and Toxicology as well as Epidemiology. I served for eight years as Director of the Environmental Health Resource Center of the State of Illinois which functioned as part of the Department of Occupational and Environmental Health at the University of Illinois School of Public Health and before that in the Section of Environmental Health in the Department of Preventive Medicine, University of Illinois College of Medicine. I am board-certified in Occupational Medicine. I am certified as a fellow in toxicology by the American College of Toxicology and in pulmonary disease by the American College of Chest Physicians. I created and chaired the Department of Occupational and Environmental Health at the University of Illinois School of Public Health from its inception in 1972 until 1978. In 1976, I also became Director of the Division of Occupational Medicine at Cook County Hospital and Director of the Great Lakes Center for Occupational Safety and Health at the University of Illinois in Chicago.

In pursuing my career in environmental and occupational medicine, I have carried out multiple epidemiologic studies of the effects of various occupational and environmental agents on human health. These have included studies on the effects of chlorinated hydrocarbon pesticides on the incidence of human cancers, the effects of exposure to benzo-a-pyrene and other air contaminants on human cancer, particularly respiratory cancer and, for the past 15 years, have done research on the general effects of air pollutants on populations at high risk. I served as a member or chairman on a number of panels studying the effects of environmental pollutants on

health for the National Academy of Sciences and was a member of the Medical and Biological Environmental Effects Committee for a number of years. I also served as a consultant on environmental cancer to the EPA and on the effects of environment on health for the Council on Environmental Quality for the President of the United States. My Curriculum Vitae is attached and states my other professional activities. I am currently a professor in the Department of Environmental and Occupational Health Sciences at the School of Public Health and Professor of Preventive Medicine at the College of Medicine at the University of Illinois in Chicago as well as Director of the Great Lakes Center for Occupational Safety and Health.

My opinions, expressed here, are also based on extensive clinical experience with patients exposed to 2,3,7,8-tetrachlorodibenzo-p-dioxin (TCDD). I have personally examined more than 400 people who have been exposed, either environmentally via sprayed waste oil, chemical spills, etc. or occupationally, in the manufacture of 2,4,5-T, some of which was sold to the government for use in Vietnam.

I have served as consultant to the State of Illinois Commission on Agent Orange. I gave invited testimony before the EPA's Committee on Compensation of Victims of Toxic Waste on the subject of TCDD. I authored an invited article on the human health effects of 2,3,7,8-TCDD for the Encyclopedia Britannica. I have read over 1,000 medical articles and books pertaining to the health effects of 2,3,7,8-TCDD in support of these activities, have met with other scientists and clinicians to discuss their work, and have lectured on the topic of TCDD.

I have reviewed the medical records of John Lilley including records of medical treatment and examinations done during

the time he was in the Air Force, the discharge summary of a hospitalization at Greater Baltimore Medical Center dated February 20, 1975, a second discharge summary of a hospitalization at the same hospital dated April 24, 1975, a report of an autopsy done on January 28, 1976 and a copy of his death certificate. I have also had an opportunity to talk with Mr. Lilley's wife regarding his past medical history, family history, and exposure history. His wife supplied the following exposure information:

John Lilley was stationed at Edwards Air Force Base and later in Korea. In Korea, he was not exposed to any spraying nor did he handle any chemicals. John Lilley worked as a cargo inspector in Viet Nam from April 1966 through April 1967. It was his job to inventory cargo and participate in the unloading. He mentioned to her that he did handle drums of Agent Orange extensively and that he did get some of the chemical on him from ruptured or defective containers. He retired from the Air Force after 20 years of service in August of 1967. Mr. Lilley worked in the air craft industry after returning to civilian life, but never handled any toxic chemicals including solvents or pesticides after coming out of the service.

After coming back from Viet Nam, he complained of "water blister-like" lesions on both lower legs which were originally diagnosed as shingles. He also complained of a red rash which would later result in brownish patches on his skin. She does not recall that he was sensitive to sunlight. He also had difficulty holding a hammer and complained of numbness and tingling in his hands.

According to Mrs. Lilley, Mr. Lilley never smoked cigarettes regularly and was never a regular drinker of alcoholic beverages. He was never noted to have hepatitis or infectious mononucleosis. He did not take any medication regularly at any time.

His family history was that his father died of a stroke in his 50's or 60's. His mother had cancer of the uterus or cervix. He has five sisters all of whom are alive and well. There is no history of any leukemias or other cancers in the family.

Mrs. Lilley notes that she had a stillbirth of twins after 5 months gestation in 1969. She was told that neither of the twins was developed. She got pregnant again several months later and after a 9 month pregnancy gave birth to an eight pound five ounce baby. He had a fever which resulted in a stroke at the age of three months. He has had rashes off and on on about 13 occasions. These have been diagnosed as Scarlet Fever, German Measles, and other infectious diseases, on various occasions. The child also suffers from a lung disorder. There is no known history of liver problems.

John Lilley grew up in western Pennsylvania. He was healthy when he entered the Air Force in August of 1947 at the age of seventeen. His medical records show that he was treated for various minor problems including swollen right knee, chancroid, and several episodes of pharyngitis with chronic cough and upper respiratory infections in 1958 and '59. These upper respiratory problems ceased entirely after he had a tonsillectomy in August of 1960. He had several episodes of low back pain, fracture of the 1st through 3rd ribs, a sprained right ankle and incision and drainage of several boils in the '60's.

After going to Viet Nam, he was seen twice, once in April of '66 for a boil on the scrotum and once for a sore throat in May of '67. His retirement examination in August of '67 showed a normal cardiogram, no significant findings on the physical examination and no complaints. He was 6' and weighed 180 pounds at the time. His blood pressure was 120/84 and he was thought to be in excellent health.

Poorly differentiated lymphocytic lymphoma, nodular type, was diagnosed in September of 1970, when the patient was 40 years old. He was told he had only 6 months to live at the time and was treated with various antineoplastic IV medications including MOPP and CVPP.

The hospital discharge summary on 2/17/75 shows that Mr. Lilley had a myocardial infarction. It also notes that he had a splenectomy in 1970 after the diagnosis of lymphosarcoma was made. He had had a previous myocardial infarction in 1973. The autopsy report shows a lymphosarcomatous leukemia with various other findings, all related to the diagnosis of cancer.

The progression of his disease was from poorly differentiated lymphocytic lymphoma, nodular, to mixed histiocytic-lymphocytic, nodular, to lymphosarcomatous leukemia.

Malignant tumors are named according to the embryonal tissue that they come from. Tumors which arise from the mesoderm, or so-called middle layer, are known as sarcomas. These tissues include bone, muscle, fat, cartilage and other fibrous tissue as well as the cells of the lymph nodes kown as lymphocytes. Thus malignant tumors of these organs are usually known by the name sarcoma. Malignant tumors of the lymphocytes are known as lymphosarcomas or, sometimes, as lymphomas. When these cells proliferate widely and are distributed throughout the blood stream, the tumor is then called a leukemia. Tumor cells may also infiltrate a variety of other tissues in the body, leading to diffuse disease and destruction of many organs. This is what happened in Mr. Lilley's case. The various names for the tumor indicate the appearance and spread of the tumor. It was always in the class of tumor called sarcoma.

The incidence rate for deaths due to this tumor in white males

age 40 years in the period 1959-69 was 2 to 3 per 100,000. This is relatively rare compared to lung cancer with a rate of 6 to 15 per 100,000 in the same population. There are certain known risk factors which increase one's chances for the development of lymphosarcoma. Certain areas of the United States are known to have a high incidence rate of lymphosarcoma. Mr. Lilley did not grow up in such an area (Atlas of Cancer Mortality for U.S. Counties). Certain families are known to be predisposed to this type of illness with many members of the same family developing this type of tumor. There is no such history in Mr. Lilley's family. Exposure to ionizing radiation such as x-rays or radiation from nuclear testing or fall-out has been associated with the development of this type of tumor. Mr. Lilley had very few x-rays taken (only a couple of chest x-rays) and was never in an area where nuclear testing was or had been going on. These tumors are more common in older age groups and usually have a higher incidence in those 55 years or older. Mr. Lilley's tumor developed at the relatively early age of 40 years. These tumors are also more common in persons who have some type of immunosuppression either due to drugs, other diseases, or because of exposure to toxic agents. Mr. Lilley was exposed to an immunosuppressive agent in the form of 2,3,7,8-TCDD. TCDD is well known to cause immunosuppression in animals including primates. I have observed marked immunosuppression in many patients with heavy exposure to 2,4,5-T and its dioxin contaminants. Many of these persons have severe chloracne and a long history of working in the manufacture of 2,4,5-T and thus, there is no question of their exposure to the agent.

John Lilley's lymphosarcoma was, in my opinion, caused by his exposure to and absorption of 2,4,5,-T and dioxin particularly 2,3,7,8-TCDD, during his tour of duty in Vietnam.

The cardiac damage which he developed, particulalry since he had a normal electrocardiogram at discharge, had no history of premature heart disease in the family, was normal weight, never smoked, and was thought to be in good health on discharge all suggest that his cardiac lesion was also the result of absorption of these chemicals into his body and the development of chronic chemical intoxication as a result. There is ample evidence in the literature, and particularly in animal experimentation, of the effects of dioxin on the heart.

Agent Orange, the herbicide used in Vietnam between January, 1962 and September, 1971 contained various combinations of 2,4-D and 2,4,5-T. The latter compound was contaminated with varying amounts of dioxin, particularly 2,3,7,8-tetrachlorodibenzo-p-dioxin (TCDD).

TCDD is the most potent of a group of chemicals which, after they enter the body, cause a remarkable increase in the production of enzymes called mixed function oxidases. These enzymes have the ability to break down exogenous chemicals, particularly those considered to be carcinogens as soon as they enter the body. But, frequently it is these intermediate breakdown products which actually cause cancer. Thus, over-production of mixed function oxidases has been known to promote cancer by accelerating the effect of cancer causing compounds by increasing the dose and shortening the time to appearance of the tumor. 3-methylcholanthrene, a compound with similar effects on these mixed function oxidases, has been used experimentally for some time to increase the cancer yield in animals. It has been stated (Poland & Glover, 1973) that TCDD is more than 30,000 times as potent as 3-methylcholanthrene in its effect on mixed function oxidases and that TCDD's effects last for a much longer period of time even at very low doses. Van Miller, Lalich, et al, 1977, Kociba,

et al., 1978, and Toth et al., 1979 have demonstrated carcinogenicity of TCDD in rats and mice.

In regard to human data on carcinogenesis of TCDD, a significant body of literature has already appeared. In 1973, Tung reported increased incidence of primary liver cancer among all cancer patients admitted to Hanoi hospitals. In 1977, Theiss and Frentzel-Beyne reported on four cancer deaths out of 15 total deaths occurring in 53 workers exposed to 2,3,7,8-TCDD after an accident in a plant manufacturing 2,4,5-T in Germany in 1953. In 1979, Hardell and Sandstrom studied 52 patients with soft tisssue sarcoma and found the relative risk for development of cancer to be 5.3 times greater than usual for those exposed to phenoxy acid and 6.6 for those exposed to chlorophenols. Hardell in 1979 studied patients with histiocytic malignant lymphoma and 11 of these patients reported definite exposure to phenoxyacetic acids or chlorophenols. Rappe in 1979 also reported an increased incidence of primary liver cancer in members of the Vietnamese population exposed to herbicide.

Additional studies of various kinds have been carried out in the past four years that also show an increased incidence of cancer, particularly soft tissue sarcomas, in individuals exposed to phenoxy acids containing TCDD. Honchar and Halperin (1981) reported on four cases which appeared in different locations in the United States in individuals exposed to TCDD. Since this is a rare tumor, it was felt that this suggested an association. In 1982, three additional cases were reported for a total of seven cases, all from two chemical plants where workers were exposed to TCDD. In 1981, Erikson, et al., in a case control study found that individuals exposed to chlorophenol, chlorinated phenols, or phenoxy herbicides had a relative risk of 5.1 of developing soft tissue sarcomas. If only phenoxy herbicides were considered, the risk increased to 6.8.

Hardell in 1981 reanalyzed his 1979 data and carried out a new case control study. Again, an increase relative risk was found, this time of 8.2 in those individuals who reported exposure to chemicals containing TCDD. Olsson, H. and Brandt, L. in 1981 reported on 123 non-Hodgkins sarcomas. Five of them had sarcomatous skin lesions. Four of the five gave a history of spraying phenoxy herbicides. Bishop and Jones in 1981 reported on two cases of non-Hodgkins sarcoma in workers similarly exposed. Bartell, E. again in 1981 by reviewing the cases of 1,958 male pesticide applicators found a standardized mortality ratio of 2.1 for bronchial cancer. They also found one soft tissue sarcoma and five lymphomas in this group but did not calculate any standardized mortality ratio.

Theiss, A.M., Frentzel-Beyne, R., et al., followed up on the study carried out by him and Goldman in 1977, published the results of a study in 1982 which examined 74 males exposed to TCDD in an explosion in 1953 along with controls. Seven malignancies were found in the exposed group with an expected number of four. Of the seven, three were cancers of the stomach with 0.6 expected and one was cancer of the colon with 0.35 expected. They felt that the stomach cancers were significantly increased.

Bishop and Jones in 1981 found two non-Hodgkins lymphomas of the scalp in two workers exposed to penachlorophenol which contains other dioxins particularly hexachlorodibenzo p-dioxin which, while not as toxic as 2,3,7,8-TCDD, has the same characteristic effects. In 1981 Sarma and Jacobs reported on three cases of soft tissue sarcoma in veterans exposed to herbicides in Vietnam but without noting any denominator and therefore without rates.

The above scientific data including those on mechanisms of action, animal experimentation and human studies indicate that

2,3,7,8 TCDD causes malignancies in multiple species including man. More specifically, TCDD has been associated with soft tissue sarcomas, a particular type of tumor, in humans.

Moreover, John Lilley did not have any of the other known risk factors for the development of this disease. He was exposed to an immune suppressor, tumor promoter, and known carcinogen in the form of 2,3,7,8-TCDD. His exposure was prolonged and extensive, the latency to tumor development was short but adequate (over four years), and the type of tumor he had has been associated with exposure to TCDD in humans. Therefore, in my opinion, his exposure to Agent Orange is the likely cause of his malignancy and death at well above the "50% certainty level."

/s/ Bertram Carnow
BERTRAM CARNOW, M.D.

Subscribed and sworn to before me this
16th day of October, 1984.

My commission expires:
July 18, 1987

/s/ Sharon T. Parnell
Notary Public

# APPENDIX

UNITED STATES DISTRICT COURT *FILED UNDER SEAL*
EASTERN DISTRICT OF NEW YORK

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|---|---|---|
| In re | | |
| | 79-C-467 | CV-81-991 |
| | 79-C-747 | CV-81-995 |
| "AGENT ORANGE" | 79-C-2752 | CV-81-1199 |
| | 79-C-2846 | CV-81-2339 |
| | CV-80-0275 | CV-81-2721 |
| | CV-80-0613 | CV-82-3106 |
| | CV-80-0693 | CV-82-0208 |
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| | CV-80-1277 | CV-82-1849 |
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| | CV-81-522 | MDL No. |
| | CV-81-665 | 381 (JBW) |
| | CV-81-1295 | |
| | CV-81-2349 | |
| | CV-81-2726 | |
| | CV-81-519 | |
| | CV-81-662 | |

# UNITED STATES' MEMORANDUM IN IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED ON THE GOVERNMENT CONTRACT DEFENSE

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### A. Whether The Government Established The Specifications For Agent Orange Involves Genuine Issues of Fact[8]

Defendants contend that "plaintiffs have not seriously questioned that the government established the specifications for Agent Orange, and that the Agent Orange met the government's specifications in all material respects." Defendants' Memorandum at 49. While it is not at all clear why the plaintiffs would essentially concede two of the three elements of a complete defense to their action, suffice it to say, defendants have hardly established proof sufficient to support a summary judgment. In fact, inasmuch as the defendants cannot seriously deny that the presence and level of dioxin in Agent Orange was *unilaterally* determined by the individual manufacturers, the defense should not be available to the defendants. To permit the defense under the circumstances presented here, would subvert the policies underlying the defense. Nevertheless, assuming it is still relevant whether the limited states established the general specifications for the two components of Agent Orange, the Court should consider the following evidence, which defendants chose not to present to the Court:

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[8]Defendants will no doubt argue that the first two elements of the government contract defense have been established before Judge Pratt. First, the United States had been dismissed entirely from this lawsuit at the time defendants moved for summary judgment and, therefore, conducted no discovery and took no part in the summary judgment proceedings. Second, this Court has held that it will not be bound by Judge Pratt's findings concerning the government contract defense. Third, justice and fairness requires that this Court have the benefit of the best evidence available before proceeding with summary of judgment.

1. *EXHIBIT:* 27
   *DATE:* April 1967
   *AUTHOR:* Ernest R.Higgins/U.S. Army
   *ADDRESSEE:* Commanding General/Army Munitions
   *SUBJECT:* It is reported that "[a] variety of herbicides were procured off the shelf and shipped to VN." * * * "MILLIONS OF GALLONS OF THE HERBICIDE 'ORANGE' HAVE BEEN PROVIDED, ON AN UNCLASSIFIED BASIS, BY THE DEFENSE GENERAL SUPPLY AGENCY FOR THE U.S.A.F. THE SPECIFICATIONS USED IN THE PROCUREMENTS HAVE BEEN PROVIDED BY THE MANUFACTURERS OF THE PRODUCT AND CALL FOR A 50:50 MIX OF THE N-BUTYL ESTERS OF 2,4-D AND 2,4,5-T."

2. *EXHIBIT:* 4
   *DATE:* October 25, 1967
   *AUTHOR:* R.B. Scott/Hercules
   *ADDRESSEE:* W.E. Vanderventer/Air Force
   *SUBJECT:* Hercules supplies its proposed specifications for Agent Orange: "We believe these [specifications] are both practical and sufficiently rigid to be acceptable to industry and to the government agency concerned."

3. *EXHIBIT:* 28
*DATE:* June 1, 1962
*AUTHOR:* Keith Barrons/Dow
*ADDRESSEE:* J.R. Frank/U.S. Army
*SUBJECT:* Dow supplies its specifications for 2,4-D and 2,4,5-T.

4. *EXHIBIT:* 5
*DATE:* January 30, 1968
*AUTHOR:* George Kampson/Monsanto
*ADDRESSEE:* Edward Bartlett/U.S.A.F.
*SUBJECT:* Monsanto's proposals concerning the specifications for Agent Orange.

5. *EXHIBIT:* 29
*DATE:* January 29, 1964
*AUTHOR:* U.S. Army Laboratories Proceedings of the First Defoliation Conference
*ATTENDEES:* Herbicide Manufacturers, including a number of defendants.
*SUBJECT:* Army turns to industry to supply a herbicide that will meet its military needs: "Ordinarily with military R & D we have a military concept that leads to the statement of a military requirement, technical characteristics, performance specifications, and other strictly delimited aspects. In this program, we do not have rigid specified characteristics. I have stated some of the broad requirements that a successful defoliating chemical

should have, but with this general framework, we will accept and use materials that will do a job for us. In a few years , it may be that we will come up with more definite specifications, but at the moment, we simply solicit the assistance of you gentlemen in finding materials that can be used successfully with the reasonably broad and general guidelines. . . ."

6. *EXHIBIT:* 30
*DATE:* May 2, 1983
*DEPOSITION:* Cecil H. Russell/Monsanto
*SUBJECT:* Monsanto wrote the specifications for Agent Orange: Q. Did you create the specifications for Orange I? A. I wrote it, my version of it. Q. Well, when you say you wrote your version of it, was not your version the one that was then incorporated into MIL specs? A. They were the same."

Even without an opportunity to conduct any discovery, it is apparent to the United States that defendants have brought forth only a small fraction of the relevant evidence on this issue, and certainly only the evidence which supports their contentions.[9] Evidence similar to that provided in this memorandum

[9]The defendants have been successful in focusing the plaintiffs and the Court's attention to the issue of whether the government established the specifications for "Agent Orange." The United States suggests that the

abounds, and needs to be considered by this Court before considering summary judgment. Considerable additional evidence will be provided once discovery is permitted.

### B. Whether The Agent Orange Manufactured By The Defendants Met Government Specifications Involve Genuine Issues Of Fact

At the time the Court set forth this element of the government contract defense, it seems unlikely that the Court appreciated the complexity of this issue.[9] There are over sixty known contracts for the manufacture of herbicides containing 2,4,5-T for use in Vietnam, involving at least seven manufacturers, spanning a decade. Despite of defendants' assertions of strict compliance with the specifications, there is evidence that government in fact rejected individual batches of Agent Orange. For example, 8,200 gallons of Dow's product failed to meet the required blend ratio. Exhibit 31. Hercules sold defective Agent Orange to the government in July and August of 1967. In September, 1967 Hercules shut down its Jacksonville, Arkansas plant due to its inability to produce "on-spec" Agent Orange. Exhibit 32. Moreover, by the express terms of the contracts, compliance with the specifications, quality assurance, and inspections were the sole responsibility of the defendants.

By a procedural maneuver, the defendants have attempted to obtain summary judgment, while insuring that the United States would not discover evidence on these very issues. Nevertheless, it is clear that there are indeed genuine issues

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*only* relevant component of Agent Orange, for the purpose of this litigation, is 2,4,5-T. It is only 2,4,5-T in which dioxin is implicated. There can be no dispute that defendants have dominated the production and marketing of 2,4,5-T commercially for at least a decade *before* they contracted to provide 2,4,5-T for use in Vietnam.

of material fact concerning defendants' compliance with terms of various government contracts.

### C. Whether A Defendant Was Aware Of Hazards That Might Reasonably Have Affected The Government's Decision About The Use Of Agent Orange And Failed To Disclose Them To The Government Involves Genuine Issues Of Fact

Once again, in formulating this element of the government contract defense, it is doubtful that the Court appreciated the potential factual complexity of the issue. In a context in which several defendants supplied herbicides at numerous times across an extended span of years, the evidence necessary for one or more defendants to establish the government contract defense might include the knowledge that one or another defendant had as compared to the knowledge the government had, at various points of time, concerning the alleged hazardous aspects of Agent Orange. The complexities of proof are exponentially compounded when the relative knowledge of the government and a particular defendant over a period of years is in turn linked to the varying time periods of exposure of multiple plaintiffs. In addition, with regard to the differing time periods concerning the exposure of each plaintiff, it appears that the specifications changed over time. Rather than attempting to address these difficult, though unavoidable, factual issues, defendants elected to pursue a deceptively simplistic course of seeking out obscure, isolated examples of "government knowledge" or the "government's opportunity to have obtained knowledge", in the hope of creating an overall impression of satisfying this element of the defense. In doing so, they failed to grasp the full, factual implications of the so-called "third" element of the defense and, consequently, have failed to establish the facts necessary to support the government contract defense.

Defendants also ask the Court to consider the fact that the United States has not had an opportunity to conduct discovery on this issue. The full measure of the scope of the Government's relevant knowledge comes to the Court solely through the eyes of the manufacturers. Surely the United States must have an opportunity to be heard concerning the extent of its relevant knowledge. Still, the Court is invited to review information which the manufacturers chose *not* to share with the Government during the *relevant* time periods:

1. *EXHIBIT:* 33
   *DATE:* May 4, 1965
   *AUTHOR:* L.O. White/Dow
   *ADDRESSEE:* Internal Memorandum
   *SUBJECT:* Dow sets its own internal specifications for the level of dioxin in its 2,4,5-T.

2. *EXHIBIT:* 34
   *DATE:* June 22, 1965
   *AUTHOR:* Tiffany/Dow
   *ADDRESSEE:* Confidential Internal Memorandum
   *SUBJECT:* Dow establishes an analytic method for detecting 2,3,7,8-TCDD in 2,4,5-T by gas-liquid chromatography.

3. *EXHIBIT:* 35
   *DATE:* June 24, 1965
   *AUTHOR:* U.K. Rome/Dow
   *ADDRESSEE:* Ross Mulholland/Dow
   *SUBJECT:* Confidential letter concerning problems with chloracne: "As you well know, we had a serious situation in

our operating plants because of contamination of 2,4,5-T with impurities, the most active of which is 2,3,7,8-TCDD. This material is exceptionally toxic. * * * If it is present in the trichlorophenol, it will be carried through into the T acid and hence into formulations which are to be sold to the public. One of the things which we want to avoid is the occurrence of any acne in consumers. I am particularly concerned here with persons who are using the material on a repeated basis . . . . *If this should occur, the whole 2,4,5-T industry will be hard hit and I would expect restrictive legislation, either barring the material or putting very rigid controls upon it.*

4. *EXHIBIT:* 36
*DATE:* June 16, 1966
*AUTHOR:* J.J. Ford/Analytical Div. Hercules
*ADDRESSEE:* E.E. Christofano/Medical Dept. Hercules.
*SUBJECT:* Internal Memorandum discussing the various levels of dioxin in its 2,4,5-T.

5. *EXHIBIT:* 37
*DATE:* August 26, 1965
*AUTHOR:* J.J. Ford/Hercules
*ADDRESSEE:* M.A. Taves/Hercules
*SUBJECT:* The analytical data obtained on the "dioxin" content of its 2,4,5-T.

6. *EXHIBIT:* 38
*DATE:* March 30, 1965
*AUTHOR:* A.F. Sidwell/Hercules
*ADDRESSEE:* J.P. Frawley/Hercules
*SUBJECT:* The formation of TCDD in its 2,4,5-T.

7. *EXHIBIT:* 39
*DATE:* June 10, 1965
*AUTHOR:* J.P. Frawley/Monsanto
*ADDRESSEE:* V.K. Rowe/Dow
*SUBJECT:* Discussion of techniques to identify dioxin in 2,4,5-T.

8. *EXHIBIT:* 40
*DATE:* February 3, 1967
*AUTHOR:* W.J. McCoy/Dow
*ADDRESSEE:* V.K. Rowe/Dow
*SUBJECT:* Discussion concerning competition between Dow and Thompson Chemical, and whether to honor Thompson's request for information concerning its "severe chloracne problems."

9. *EXHIBIT:* 1
*DATE:* March 19, 1965
*AUTHOR:* V.K. Rowe/Dow
*ADDRESSEE:* Several Herbicide Manufacturers including Hercules
*SUBJECT:* Invitation to come to Dow "to discuss toxicological problems caused by the presence of certain highly toxic impurities in certain samples of 2,4,5-T trichlorophenol and related material." * * * ***"Our discussions will deal only with the toxicological and analytical aspects of the problem. We will not discuss manufacturing know-how, sales or anything else not dealing with the problem of health.*** It is our hope that through this meeting, we will acquire a better understanding of the problems and that each company will then proceed independently as it sees fit to institute such self-imposed controls on its production as are necessary to insure the safety of its products."

10. *EXHIBIT:* 41
*DATE:* March 24, 1965
*AUTHOR:* E.L. Chandler/Diamond Shamrock
*ADDRESSEE:* Internal Memorandum
*SUBJECT:* Following the conference referenced above, Chandler concluded: ". . . The purpose of this meeting was obviously designed to help us solve

this problem before outsiders confuse the issue and cause us no end of grief . . . ."

11. *EXHIBIT:* 42
*DATE:* July 9, 1965 (telephone call)
*AUTHOR:* J.P. Frawley/Hercules
*ADDRESSEE:* Memorandum for File
*SUBJECT:* Confidential notes of a telephone call concerning the acnegen problem with 2,4,5-T. "On July 9, 1965, Mr. Earl Farnham of Dow Chemical Company telephoned stating that he was calling at the request of Mr. Donald Balwin, Vice-President of Dow to inquire how serious I considered the chloracne problem in relation to the consumer use of 2,4,5-T. * * * [H]e stated that Dow had gone to great expense to alter their manufacturing conditions in order to produce 2,4,5-T acid which has less than 1 ppm acnegen. * * * *He then stated that Dow was extremely frightened that this situation might explode. They are aware that their competitors are marketing 2,4,5-T acid which contains alarming amounts of acnegen and if the government learns of this, the whole industry will suffer. They are particularly fearful of a congressional investigation and excessive restrictive legislation on manufacture of pesti-*

> *cides which might result. I advise Mr. Farnham that we shared his fear but are not aware of his allegation that the competitors' products were hazardous. He asked if Hercules had established an internal specification. I stated that he should discuss this with someone in our management . . . .*

This is but a fraction of the information which defendants chose *not* to share with their largest single herbicide customer during the relevant time periods — the United States Government. Whether such information "might reasonably have affected the government's decisions" concerning whether and how to use Agent Orange surely involves genuine issues of fact. This last component of the defense is hardly amenable to summary judgment.

## CONCLUSION

The government contractor defense should be rejected in this case because it would not further the policies it purports to serve. In addition, there are genuine issues of material fact exists which bears upon the validity of each contention relating to the defense.

Accordingly, defendants' motioin for summary judgment on the government contractor defense should be denied.

Respectfully submitted,

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